IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

DEBRA M. BARKES, Individually and As Surviving Spouse of JEWELL WAYNE BARKES, Deceased,	)	**Supreme Court No.**
Plaintiff/Appellant,	)	**Appeal No. M2600-0214-COA-R3-CV**
v.	)	**Warren County Circuit Court Trial Case No. 946**
RIVER PARK HOSPITAL, INC., and RIVER PARK HOSPITAL (TN),	)	
Defendants/Appellants.	)	

RULE 11 APPLICATION FOR PERMISSION TO APPEAL FILED ON BEHALF OF DEBRA M. BARKES, INDIVIDUALLY AND AS SURVIVING SPOUSE OF JEWELL WAYNE BARKES

Pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure (TRAP), Plaintiff Debra M. Barkes requests the Court to grant her permission to appeal from a decision rendered by the Tennessee Court of Appeals[1] on December 29, 2008. A copy of this opinion is attached in the Appendix as Exhibit 1. No petition for rehearing was filed.

This case raises important issues regarding the role of the Tennessee Court of Appeals in our judicial system and the law of hospital liability and the legal duties of a hospital under

[1] The Court of Appeals' opinion was written by Judge Clement with Justice Koch concurring and Judge Cottrell not participating. Debra Barkes respectfully requests that Justice Koch not participate in the decision on whether this application should be granted or in any other aspect of this appeal.

Tennessee Law.[2] This case was tried under the Tennessee Medical Malpractice Act. No issue was raised on appeal concerning the admission into evidence of Plaintiff's expert witness testimony that the recognized standard of acceptable professional practice for hospital emergency rooms in McMinnville, Tennessee or similar communities in July, 2000 was to have all patients presenting to an emergency room assessed by a physician. In a classic battle of the experts, the jury adopted the testimony of the Plaintiff's expert witnesses and rejected the testimony of the hospital's expert witnesses. Accordingly, there is material evidence in this record to support the jury's verdict in this case. Rather than affirm the verdict, the Court of Appeals raised a duty issue out of left field that was not raised in the trial court or preserved for an appeal. The Court of Appeals substituted its judgment on the applicable standard of care for the testimony of Plaintiff's expert witnesses, whose testimony had been adopted by the jury in the trial below. The Court of Appeals abandoned its role as a neutral arbiter, became an advocate for the hospital and substituted its judgment on liability for that of the jury. In doing so, the Court of Appeals rendered the provisions of TCA §29-26-115 nugatory and reversed settled Tennessee hospital liability law established in *Bryant v. McCord,* No. 01A01-9801-CV-00046 (Tenn. Ct. App., filed Jan. 12, 1999) and adopted a Maine Supreme Court case, *Gafner v. Down East Community Hospital*, 735 A.2d 969 (Me. 1999) that was never cited, briefed or argued by the parties. The action taken by the Court of Appeals in this case and its unnecessary resolution of issues that were not before it raise important questions of law, raise important policy issues concerning the role of the Court of Appeals in our judicial system, create the need to secure

[2] An electronic version of this Rule 11 Application may be downloaded (with links to Westlaw and PDF files of the transcript) at: http://www.drslawfirm.com/barkesr11.doc (Microsoft Word format) and at http://www.drslawfirm.com/barkesr11.htm (html format).

uniformity of decisions in Tennessee courts and require this Court to exercise its supervisory authority.

I. PROCEEDINGS IN THE LOWER COURT

A. The Trial Court

This case was tried before the Honorable Larry Stanley Jr. for six days in January, 2006. During defendants' motion for a directed verdict at the close of proof, the hospital conceded that Plaintiff had a valid legal theory under *Bryant v. McCord*, No. 01A01-9801-CV-00046 (Tenn. Ct. App., filed Jan. 12, 1999) that the hospital was directly negligent for failing to enforce its policies and procedures, but argued that Plaintiff's case failed on the element of causation. R. Vol. XVII, pp. 1212-1213. ("They've got the legal theory. They have argued it very well, but they don't have the evidence to allow the jury to say that the policy more likely than not caused the case to come out one way or the other." R. Vol. XVII, p. 1213).[3] The trial court sustained the hospital's motion for a directed verdict as to the hospital "maintaining a safe environment, negligent hiring or oversight of physicians or other health care providers." R. Vol. XVII, p. 1222.

The case was submitted to the jury on the claims that the hospital was liable under a theory of direct negligence and under a theory of vicarious liability for the conduct of its employee, Jeffrey Jolly. After spending part of January 24, all of January 25 and part of January 26, 2006 in deliberations, the jury determined that the hospital was at fault and awarded $7,206,907.80 in damages. It determined that the hospital employee, Jeffrey Jolly, was not at

[3] The 20 volumes of the Record include the Technical Record, contained in Vol. 1-9, and the Transcript of the Evidence, found in Vol. XI-XX. Vol. X is the transcript of the argument on the post-trial motions. There is one supplemental volume of the Technical Record. Appellant will follow the Clerk's numbering system, denoting a citation to the Technical Record as "R. Vol. (number), p. (number)," and a citation to the Transcript of the Evidence as "R. Vol. (Roman numeral), p. (number)." Exhibits will be cited as "Exh.," followed by the appropriate number. The defendants will be referred to as "the hospital."

fault. R. Vol. 4, pp. 492-493. In regard to the comparative fault issues raised by River Park Hospital, the jury determined the hospital was 100 percent at fault. R. Vol. 4, pp. 492-493. It found no fault on the parts of Dr. Rosa Stone, nurse practitioner Sherry Kinkade, or Mark Weeks, the co-medical director of the Emergency Department, who was on vacation on the day Plaintiff's decedent, Wayne Barkes, went to the hospital Emergency Department for treatment, was released shortly thereafter and collapsed within two hours of his release.

In its post-trial motions, the hospital did not assert that as a matter of law a Tennessee hospital has no duty to ensure that its policies and procedures were followed to provide quality health care to its patients.[4] R. Vol. 5, pp. 590-647.

On May 12, 2006, the trial court heard the hospital's post-trial motions. R. Vol. X, pp. 1-95. On May 16, 2006, the trial court denied the hospital's Motion for a Judgment Notwithstanding the Verdict, Motion for a New Trial and Suggestion for a Remittitur. R. Vol. 9, pp. 1194-1195. Sitting as a thirteenth juror, the trial court held that:

> "The Court, in its role as thirteenth juror, has considered all the evidence presented at trial, the arguments of counsel, the testimony of witnesses, the exhibits introduced into evidence, and the entire record as a whole. After independently weighing the evidence, this Court finds that the weight of the evidence preponderates in favor [of] the Court's finding that the judgment in this case is correct."
>
> R. Vol. 9, pp. 1194-1195

In regard to its denial of the hospital's request for a remittitur, the trial court held that:

> "The Court has also given great consideration to the request for a remittitur by the Defendants – an issue which obviously has no clear line differentiating between a reasonable amount and an unreasonable amount to adequately compensate for the loss in a wrongful death action. The Court has reviewed statutory law and the verdicts in other cases of this type as provided by counsel, along with all the proof

[4] Defense counsel could not properly assert that in Tennessee a hospital owed no duty to enforce its policies and procedures because the hospital had conceded that this was a valid legal theory when it argued its motion for a directed verdict at the close of proof. R. Vol. XVII, p. 1213.

> in this case dealing with losses brought about by the death of the decedent, including the proof regarding loss of consortium and medical expenses. This Court finds that the jury's award was not so excessive as to indicate that it was formed with sympathy and passion. This Court further finds that the award was not beyond the range of reasonableness for the loss of the life of the decedent. Therefore the Court finds that a suggestion [for a] remittitur is not warranted and their motion to this effect is hereby denied."
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> R. Vol. 9, p. 1195

In short, the hospital received a fair trial before an able and conscientious trial judge, who, acting as thirteenth juror, affirmed the jury's verdict in all respects.

B. The Court of Appeals

The hospital did not raise any issue in the Court of Appeals regarding: (1) any evidentiary ruling made by the trial court concerning expert witness testimony; (2) the trial court's denial of the request for a remittitur and (3) whether Tennessee courts recognized a direct negligence claim against a hospital for failing to insure that its policies and procedures were enforced. Hospital Opening Brief, p. iv. In fact, the hospital in its opening brief[5] acknowledged that Tennessee courts have recognized a direct negligence action against a hospital for failing to enforce its policies and procedures, stating that:

> "Except for four limited factual scenarios in which a hospital has a recognizable 'legal duty,' Tennessee has not recognized a doctrine of corporate negligence that allows ***direct*** liability to be established against a hospital. Bryant v. McCord, 1999 WL 10085, *11 (Tenn. App. 1999) vacated by Bryant v. HCA Health Services of Tennessee, Inc., d/b/a/ Centennial Medical Center, 15 S.W.3d 804, 810-811 (Tenn. 2000) (vacating Court of Appeals ruling and affirming Trial Court's dismissal on duty to obtain informed consent) (a copy is included within the Appendix). The only four legal duties a hospital has are to use reasonable care (1) to maintain their facilities and equipment in a safe condition, (2) to select and retain only competent physicians, (3) to supervise the care given to patients by hospital personnel, and (4) to adopt and enforce rules and policies designed to

[5] By quoting from Defendant's opening brief filed in the Court of Appeals, Plaintiff in no way endorses the views expressed in the quotation. Plaintiff submits that in the case at bar, the hospital's liability is properly determined by the expert witness proof submitted to the jury pursuant to TCA §29-26-115.

> ensure that patients receive quality care. Bryant, 1999 WL 10085 at 11. During trial, the Trial Court granted a directed verdict to the Hospital on any claims related to the first, second and third of these four legally recognizable duties. The only claim of direct liability against the Hospital that survived the Motion for Directed Verdict was that the Hospital purportedly did not use reasonable care 'to adopt and enforce rules and policies designed *to ensure that patients receive quality care*' (italics added)."
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> Hospital Opening Brief, p. 32[6]
> (emphasis in original)

While also raising issues concerning causation and improper closing argument by Plaintiff's counsel, the principal thrust of the hospital's appeal was that in order for the hospital to be found directly negligent, the jury must find underlying liability on the part of a physician, nurse or other health care[7] provider in regard to Wayne Barkes' death. Since the jury exonerated Dr. Stone, Nurse Practitioner Kinkade and Dr. Weeks, the hospital contended in the Court of Appeals that the jury's verdict was inconsistent because it found the hospital to be 100 percent at fault.

Without requesting any briefing on the issue, without raising the issue in oral argument and without giving the parties any notice, the Court of Appeals decided this case on an issue that was never presented to the trial court and never preserved for an appeal, holding that "[h]aving determined that Tennessee has not adopted the corporate negligence doctrine, we find no basis upon which River Park Hospital can be held directly liable to the Plaintiff based upon the facts of

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[6] The hospital incorrectly stated the *Bryant* opinion had been vacated by this Court. This Court's opinion in *Bryant v. HCA Health Services of Tennessee*, 15 S.W.3d 804 (Tenn. 2000) did not vacate the ruling of the Court of Appeals in that case. It affirmed the Court of Appeals' determination that the hospital under the circumstances of that case owed no duty to obtain Rhonda Bryant's informed consent, which was the only issue before it. The case was remanded to the trial court for further proceedings on the direct negligence claim against the hospital for its failure to supervise and monitor the use of investigational medical devices, a claim that was recognized in the decision by the Court of Appeals.

[7] The hospital requested a jury charge to this effect, which the trial court properly declined to give. This was the basis for the issue the hospital raised concerning the jury charge given by the trial court.

this case."[8] Opinion, p. 10. Since the Court of Appeals held that there was no claim for direct negligence against the hospital, it determined that Appellant's only viable claim against the hospital was for vicarious liability. Opinion, p. 11. The Court of Appeals determined that the jury's verdict was inconsistent because it found the hospital 100 percent at fault with no finding of fault on the part of the hospital employee, Jeffrey Jolly.

1. The Basis for the Jury's Finding of Fault

The Court of Appeals' analysis is fatally flawed. In its opinion it held that "the jury found that River Park was 100% at fault due to the hospital's failure to enforce the 1997 written policy that every patient presented to the emergency room would be seen by a physician." Opinion, p. 4. This statement is simply not accurate.

The jury determined that the hospital was 100 percent at fault. R. Vol. 4, p. 492. The trial court, in pertinent part, instructed the jury on fault as follows:

> "The first part of fault is negligence. A hospital must use reasonable care to avoid causing injuries to patients. The knowledge and care required by hospitals is the same as other reputable hospitals practicing in the same or similar communities and under similar circumstances."
>
> R. Vol. XVIII, pp. 1413-1414

This case was a battle of the experts which the jury resolved by accepting the testimony presented by Plaintiff's expert witnesses and rejecting the testimony of the hospital's expert witnesses.

In compliance with TCA §29-26-115, the Plaintiff introduced into evidence the testimony of several expert witnesses: (1) Morton Kern, M.D., a cardiologist, who testified that the recognized standard of acceptable professional practice for emergency medicine for

[8] The Court of Appeals determined the hospital owed no duty to promulgate or enforce its policies. Thus it determined the hospital could not be held directly liable to Plaintiff in this case.

McMinnville, Tennessee or a similar community on July 26, 2000 required that Wayne Barkes be examined by a physician; R. Vol. XVI, p. 854-855; (2) Dr. Roy Keys, an emergency physician, who testified that at the relevant time the recognized standard of acceptable professional practice when a patient presented to an emergency room in Ashland, Kentucky, which is a similar community to McMinnville, Tennessee, is that a patient be seen by a physician; R. Vol. XV, pp. 628-630; and (3) Alan L. Markowitz, a hospital administrator, who testified that based on his knowledge of hospitals in similar communities, legal requirements and the hospital policies and procedures, the recognized standard of acceptable professional practice for emergency room medicine in McMinnville, Tennessee or a similar community on July 26, 2000, required that Mr. Barkes be examined by a physician; R. Vol. XIII, pp. 334, 349-350, 354. This proof was supplemented by the testimony of the hospital's corporate representative, Jeffrey Jolly, who admitted that the standard of care in McMinnville or similar communities in 2000 was for the hospital to follow its own written policies. R. Vol. XIV, pp. 190-191, 196.

The hospital presented expert witness testimony that the recognized standard of acceptable practice for emergency rooms in McMinnville, Tennessee or similar communities did not require that a physician examine Wayne Barkes on July 26, 2000. *See* R. Vol. XVI, pp. 907, 1916 (testimony of Dr. Kevin Bonner, emergency room physician); R. Vol. XVI, p. 1091 (testimony of Kevin Spivey, registered nurse) and R. Vol. XVII, p. 1182 (testimony of Jennifer Ezell, nurse practitioner).

In short, the Court of Appeals improperly limited the basis for the jury's finding of fault in this case so that it could reverse the jury's verdict based upon its ruling that a hospital owed no duty to its patients to follow its own policies and procedures, an issue it raised sua sponte without notice to the parties and without allowing the parties to be heard on this issue. This determination

by the Court of Appeals violates the appropriate standard of appellate review and resulted in the Court of Appeals substituting its determination on liability for the verdict rendered by the jury and approved by the trial judge, acting as a thirteenth juror.

Under Tennessee law, "[t]he weight of the theories and the resolution of legitimate but competing expert opinions are matters entrusted to the trier of fact." *Brown v. Crown Equipment Corporation*, 181 S.W.3d 268, 275 (Tenn. 2005). By finding the hospital at fault, the jury in this case rejected the testimony of the hospital's expert witnesses and accepted the testimony of Plaintiff's expert witnesses. R. Vol. 4, pp. 492-493. The trial court, sitting as a thirteenth juror, approved the jury's verdict after duly considering and weighing all the evidence. R. Vol. 9. pp. 1194-1195. Under the applicable standard of review, the Court of Appeals was required to: (1) take the strongest legitimate view of the evidence in favor of the verdict, (2) assume the truth of all evidence that supports the verdict, (3) allow all reasonable inferences to sustain the verdict and (4) discard all countervailing evidence. *Barnes v. Goodyear Tire and Rubber Company*, 48 S.W.3d 698, 704 (Tenn. 2000).[9] "Appellate courts shall neither reweigh the evidence nor decide where the preponderance of evidence lies. If the record contains any material evidence to support the verdict, [the jury's findings] must be affirmed; if it were otherwise the parties would be deprived of their constitutional right to trial by jury." *Id*., 48 S.W.3d at pp. 704-705. In short, the Court of Appeals was required to affirm the jury's verdict in this case[10] because the record contained material evidence: (1) on the applicable recognized standard of acceptable professional practice for an emergency room in McMinnville, Tennessee or a similar community on July 26,

[9] In its opinion at p. 5 the Court of Appeals paid lip service to the appellate standard of review by reciting it, but never applied that standard of review in its analysis.
[10] Unless it determined that the trial court committed an error of law, which Applicant will demonstrate the trial court did not do.

2000, (2) that the hospital breached that standard and (3) that such breach proximately caused Mr. Barkes' death, which would not have otherwise occurred, R. Vol. XV, pp. 628-630, 642-644, 649-650 (testimony of Dr. Keys), R. Vol. XVI, pp. 827, 833, 854-855 (testimony of Dr. Morton Kern) and R. Vol. XIII, pp. 334, 349-350, 354 (testimony of Alan Markowitz).

Instead, the Court of Appeals substituted its own judgment for the testimony of Plaintiff's expert witnesses and the judgment of the jury, stating as follows:

> "In the case at bar, Plaintiff sought to hold several health care providers and River Park Hospital liable for medical malpractice because Mr. Barkes was seen by a nurse practitioner without being seen by a physician. This argument suggests that the hospital breached a standard of care by allowing Mr. Barkes to be examined, treated and discharged by a nurse practitioner without requiring that he be 'seen' by a physician. To appreciate the fallacy of this argument, to the extent that it suggests a standard of care was violated because a physician did not 'see' Mr. Barkes, requires an appreciation of three facts. One, hospitals may not control the 'means and methods by which physicians render medical care and treatment to hospital patients.' *Thomas v. Oldfield*, No. M2007-01693, 2008 WL 2278512, at * (Tenn. Ct. App. June 2, 2008) (citing Tenn. Code Ann. §§63-6-204(f)(1)(A) and 68-11-205(b)(1)(A)). Two, Nurse Practitioner Kinkade and the Emergency Room physician with which she consulted, Dr. Stone, were not employees of River Park Hospital; instead they were employees of PhyAmerica Physicians, Inc. Moreover, Tennessee Code Annotated sections 63-6-204(f)(1) and 68-11-205(b)(6) preclude hospitals from employing emergency physicians such as Dr. Stone. Three, like other nurse practitioners in Tennessee, Nurse Practitioner Kinkade was authorized to render health care services without being under the omnipresent supervision or direction of a physician."
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> Opinion at p. 13.
> (our emphasis)

The Court of Appeals employed the term "argument" when in fact this was the testimony of Plaintiff's expert witnesses, which the jury deemed to be credible and adopted. No issue on appeal was presented concerning the admissibility of Plaintiff's expert witness proof. That expert witness proof, which established the recognized standard of acceptable professional practice, which governed the issue of liability, was accepted by the jury. Yet the Court of Appeals rejected that testimony and the jury's finding as "fallacious." In doing so, the Court of Appeals

substituted its own opinion on the recognized standard of acceptable professional practice for hospitals in McMinnville, Tennessee or a similar community in July, 2000. This is a blatant violation of the material evidence standard of appellate review which governs the resolution of the appeal in this case. Needless to say, the Court of Appeals refused to grant any deference to the jury's verdict in this case and substituted its own view of the hospital's fault in this case for the jury's determination of fault. This type of judicial activism cannot be countenanced in our system of justice. Simply put, the action by the Court of Appeals violated Debra Barkes' constitutional right to a trial by jury.

2. The Court of Appeals' Ruling on a Hospital's General Duty Owed to Patients

The Court of Appeals further limited a hospital's duty to exercise reasonable care to their patients to known conditions, citing *O'Quin v. Baptist Memorial Hospital*, 201 S.W.2d. 694 (Tenn. 1947). Opinion, p. 7. The limited duty recognized by the Court of Appeals would eliminate any consideration of foreseeability from a claim being asserted against a hospital in a medical malpractice case. In making this ruling the Court of Appeals once again addressed an issue that was not presented to the trial judge nor preserved for an appeal. This was yet another issue on which it failed to give the parties an opportunity to be heard. Moreover, the Court of Appeals ignored the provisions of TCA §29-26-115, which provides that a defendant is liable for breaching the recognized standard of acceptable professional practice for that defendant in the defendant's community or a similar community which results in an injury to the plaintiff which would not have otherwise occurred.

In summary, the Court of Appeals ignored the facts in the record that supported the jury's determination that the hospital was at fault. Based upon issues that were conceded in the trial court, not raised on appeal and upon which the parties were not provided with notice and an

opportunity to be heard, the Court substituted its judgment on liability for the testimony of Plaintiff's expert witnesses and the jury's findings. This resulted in a miscarriage of justice.

II. QUESTIONS PRESENTED FOR APPEAL

1. Whether the Court of Appeals erred in sua sponte deciding issues not presented to the trial court and not preserved for an appeal, upon which it gave the parties no meaningful opportunity to be heard.

2. Whether the Court of Appeals violated Debra Barkes' constitutional right to a jury trial by disregarding the evidence in the record which supports the jury's verdict and substituting its own judgment on liability for the testimony of Plaintiff's expert witnesses and the jury's determination of liability.

3. Since there is material evidence in the record which supports the finding that the hospital breached the recognized standard of acceptable professional practice for emergency rooms in McMinnville, Tennessee or a similar community on July 26, 2000, which proximately caused the death of Wayne Barkes, whether that jury verdict should be affirmed.

4. Whether the Court of Appeals' determination that the hospital owed a duty limited to known conditions of a patient is contrary to the provisions of TCA §29-26-115, which requires that a hospital conform to the recognized standard of acceptable practice in its community or a similar community.

5. Whether the jury's finding in this case that the hospital was 100 percent at fault for the death of Wayne Barkes is inconsistent with its finding that Dr. Stone, Nurse Practitioner Kinkade or Dr. Weeks were not at fault.

6. Whether material evidence in this record supports the jury's finding that the hospital's negligent conduct proximately caused the death of Wayne Barkes.

7. Whether the trial court abused its discretion in denying a new trial based upon statements made in closing argument by Plaintiff's counsel.

III. THE FACTS

As has been previously noted, while the Court of Appeals acknowledged the material evidence standard of appellate review, it never applied that standard in its analysis. To cite one glaring example, the Court of Appeals' opinion states that:

> "The record is replete with evidence that the 1997 written policy [which required that each patient to the Emergency Department be examined by a physician] was

> impliedly amended by the adoption of the 1999 policy, and that the 1999 policy represented the protocol being followed by the hospital, the emergency room physicians and the staff."
>
> Opinion, p. 4

The evidence cited above by the Court of Appeals was rejected by the jury in arriving at its verdict. Under the material evidence standard of review, the Court of Appeals was required to disregard this evidence. Moreover, the Court of Appeals' recitation of this evidence is flatly incorrect. The CEO of the hospital in 2000, Terry Gunn, testified on direct examination that the hospital's written policies, contained in the record as Exh. 5A, 5B, 5C and 5D, were replaced by a "new and improved" practice of using nurse practitioners in the Emergency Department, which did not require every patient to be seen and assessed by a physician. Mr. Gunn further testified that the Emergency Department on July 26, 2000 was expected to follow the new and improved system and that it was just a question of "paperwork" to remove the outdated 1997 policies and procedures and replace them with the "great process" the hospital had in place in 1999-2000. R. Vol. XV, pp. 708-710.

Exhibit 5C is a hospital policy which states that its purpose is "[t]o indicate JCAHO certification and indicate procedure for treating patients presenting." JCAHO is the Joint Commission of Accredited Healthcare Organizations, whose certification is required before hospitals can be paid by Medicare or Medicaid. R. Vol. XV, p. 725. Thus the hospital had a policy requiring a physician to examine each patient who presented in its Emergency Room for the purpose of JCAHO accreditation but in this suit presented testimony that it "really was not its policy." The jury rejected this inconsistent and self-serving position.

On cross-examination, Mr. Gunn testified that the policy admitted into evidence as Exhibit 5C, adopted in March 1994 and requiring that each patient be seen by the appropriate

physician, was reviewed in May 2001 by the hospital and left unchanged. R. Vol. XV, pp. 712-713. This meant that Exhibit 5C was, in fact, the policy and procedure of the hospital when Mr. Barkes was treated in the hospital Emergency Department on July 26, 2000 and impeached Mr. Gunn's prior testimony that this was not hospital policy in July, 2000 and that it "was just a matter of housekeeping" to remove it from the hospital manual and insert "the new improved process."

On redirect examination, Mr. Gunn changed his testimony yet again to testify that "the ER/ICU committee, the medical executive committee, the board of directors, the board of trustees all understood and approved the 'new process' put in place in 'this ER' that allowed nurse practitioners to see patients." R. Vol. XV, p. 726. The Court of Appeals gave credence to this testimony at page 3 of its opinion by stating "[t]he 1999 policy was approved by the medical staff of the hospital, the ER/ICU Committee (which oversees the care in the emergency room) and the Board of Trustees." In doing so, the Court of Appeals ignored Mr. Gunn's later testimony, which established that the "new improved process" had never been approved.

On recross examination, Mr. Gunn testified that he "couldn't recall" if the medical staff, the committee and the hospital board actually voted on "this new improved process." R. Vol. XV, p. 727. He then admitted the written policies for the Emergency Department requiring that each patient be seen and assessed by a physician never changed. R. Vol. XV, p. 729. Mr. Gunn testified that what he meant by testifying that all these boards approved the "new improved" process in the Emergency Department was that nurse practitioners were granted privileges to practice in the hospital Emergency Department "under the license of a physician." R. Vol. XV, p. 729.

The fact that nurse practitioners were allowed to see patients is not a bone of contention in this case. The standard of care proven in this case and accepted by the jury permits a hospital to use nurse practitioners. However, in an Emergency Department or Emergency Room, it requires a physician to examine and assess each patient because of a physician's greater knowledge and diagnostic ability which, in this case, would have, more likely than not, led to Wayne Barkes being treated for a cardiac problem on the afternoon of July 26, 2000 and saved his life.

The jury rejected Mr. Gunn's ever-changing and self-serving testimony. The applicable material evidence standard of appellate review required the Court of Appeals to disregard it as well. The Court of Appeals, however, not only adopted it, but embellished it.

The Court of Appeals' statement of facts in this case represents the factual contentions of the hospital, which the jury rejected in this case. An appropriate statement of the facts in this case as mandated by the applicable material evidence standard of review follows.

Wayne and Debra Barkes were the parents of five children, four of whom lived at home on July 26, 2000. R. Vol. XV, pp. 773-774, 783-789. Wayne Barkes was a "very devoted father;" "his children were his hobby." R. Vol. XV, p. 550. He was very active with his children in any school activity in which they were involved. R. Vol. XIII, p. 493. Mr. Barkes' devotion to his wife and children is reflected by the fact he wrote to them every day when he was overseas serving in Operation Desert Storm. A poem he wrote at that time expressing his love for his children was admitted into evidence as Exhibit 16, R. Vol. XIII, pp. 410-411.

With help from others, Mr. Barkes built his home in the Harrison Mountain community and helped his brother-in-law build a home next door. R. Vol. XIII, pp. 405-407; R. Vol. XV, pp. 539-540. Mr. Barkes was very active in his community, helping to raise funds and build a

community center in Harrison Mountain. R. Vol. XV, pp. 543-544. Mr. Barkes was a volunteer fireman who helped garner support and raise money to build a fire hall in the Harrison Mountain community. R. Vol. XV, pp. 543-544. Although the fire hall was completed after Mr. Barkes died, a plaque in that building is dedicated to his memory. R. Vol. XV, pp. 544-545.

Mr. Barkes was employed full time by the Tennessee National Guard as a Sergeant in the 212 Engineer Company in Dunlap, Tennessee. R. Vol. XV, p. 515 and R. Vol. XIII, p. 405. Mr. Barkes planned to retire from the Tennessee National Guard in October, 2000. R. Vol. XIII, p. 418. On July 26, 2000, he was at home exhausting his accumulated vacation days and sick days before he was to retire several months later. R. Vol. XIII, pp. 418-419. Mr. Barkes had a distinguished military career, serving in Vietnam and in Operation Desert Storm. R. Vol. XV, p. 525. He received a Silver Star, a Bronze Star, a Meritorious Service Ribbon, four Army Commendations and three Army Achievement Medals. R. Vol. XV, pp. 522-525.

On the morning of Wednesday, July 26, 2000, Wayne and Debra Barkes were cleaning brush, debris and broken tree limbs from their yard. R. Vol. XIII, pp. 424-425. They were using a chainsaw, an ax and a rake. *Id*. Mr. Barkes was right-handed. *Id*.

After taking a break and resuming work, Wayne Barkes complained that his left arm was hurting and went into the house. R. Vol. XIII, p. 426.

Mrs. Barkes continued to work in the yard until "one o'clock, 1:30," when she went inside to see why her husband had not returned to the yard work. R. Vol. XIII, p. 427. She found Wayne Barkes soaking his left arm in the sink. R. Vol. XIII, pp. 427-428.

Mrs. Barkes returned to the yard. Later, when she returned to the house, Wayne Barkes had showered and was sitting in a chair with an ice pack on his arm. R. Vol. XIII, p. 428.

After taking her shower, Mrs. Barkes checked on her husband again. He was not normally a complainer, but he continued to say his arm was hurting. Vol. XIII, p. 430. She told him that he needed to go to the emergency room because Mrs. Barkes "thought something was broke or somehow injured." R. Vol. XIII, p. 430. Mr. Barkes was "extremely quiet, which was unusual for him." R. Vol. XIII, p. 435. Mr. Barkes' arm was hurting, and he felt sick to his stomach. R. Vol. XIII, p. 431.

While stopping at the nearby home of their pastor's mother to drop something off as promised, Mrs. Barkes drove her husband to the Emergency Department at River Park Hospital. R. Vol. XIII, pp. 432-435.

They arrived at the Emergency Room at 4 p.m. R. Vol. XIII, p. 437. At 4:18 p.m., Wayne Barkes and Debra Barkes met with Jeffrey Jolly, who "triaged" Wayne Barkes. R. Vol. XIV, p. 211. Mr. Jolly was told that Wayne Barkes' left arm was hurting from the left elbow to the left wrist and that he was "sick to his stomach." R. Vol. XIII, p. 438. Mr. Jolly obtained information from Wayne Barkes which indicated that he had a prior history of Graves disease, that he was allergic to codeine, and that he was on Synthroid, a medication to treat his thyroid, and a weight control aid. Exhibit 1, p. 2 and p. 5. The history obtained by Mr. Jolly stated: "PT. HAS BEEN WORKING PHYSICALLY CLEARING LAND, MOVING ROCKS AND USING ROCKS." Exh. 1, medical records, p. 6. Mr. Barkes had a pulse rate of 100. *Id*.

The triage lasted four minutes. R. Vol. XIV, p. 212. Afterward, Mr. Jolly took Wayne and Debra Barkes to another room where at 4:30 p.m. Nurse Practitioner Kinkade met them. R. Vol. XIII, p. 439-440, R. Vol. XIV, p. 221. Ms. Kinkade asked what the problem was. Wayne Barkes said his left arm was hurting from his elbow to his wrist. R. Vol. XIII, p. 440. Ms. Kinkade asked what he had been doing. Mr. Barkes said he had been working on his honey-do

list. R. Vol. XIII, p. 440. After learning Mr. Barkes had been working in his yard, Nurse Practitioner Kinkade looked at his arm and moved the wrist back and forth. She then moved her hand up his arm, remarking on Mr. Barkes' strong arms. R. Vol. XIII, p. 440. She stated that she did not think Mr. Barkes broke his wrist. R. Vol. XIII, p. 441. Nurse Practitioner Kinkade prepared discharge papers, which diagnosed Mr. Barkes as having a "sprain" and prescribed ibuprofen for him. Exh. 1, medical records, p. 9. After preparing the discharge papers and having Wayne Barkes sign them, Nurse Kinkade talked with Dr. Rosa Stone, informing her that she was releasing a 48-year-old male who complained of left forearm pain for one day, that he had been working out in the yard since noon, using an ax, and that the pain was confined to his left forearm. R. Vol. XIV, p. 296-297. Nurse Kinkade told Dr. Stone "it" was a sprain and she was prescribing ibuprofen. *Id*. Dr. Stone testified that she asked Nurse Kinkade if Wayne Barkes had a prior cardiac history, if he was short of breath, or if he had other pain. *Id*. Each question was answered in the negative. Dr. Rosa Stone signed her name to the chart. Wayne Barkes was released at 4:45 p.m. *Id*. Less than two hours later Mr. Barkes collapsed at home. R. Vol. XIII, p. 443, 446. Debra Barkes made a 911 call at 6:20 p.m. EMS was dispatched and returned Wayne Barkes to River Park Hospital at 7 p.m., where he was pronounced dead. R. Vol. XIV, p. 232. Mr. Barkes died of a myocardial infarction and sudden cardiac death. Exh. 9 (death certificate).

There is abundant proof in the record which supports the jury's finding that the hospital was at fault for Wayne Barkes' death. As has been previously noted, Plaintiff presented expert witness testimony that on July 26, 2000, it was the required standard of acceptable professional practice in McMinnville, Tennessee or similar communities that each patient presenting to an emergency room should be examined by a physician. R. Vol. XVI, pp. 854-855; R. Vol. XV, pp.

628-630; R. Vol. XIII, pp. 334, 349-350, 354.[11] On July 26, 2000, no physician examined Wayne Barkes, which violated the applicable standard. R. Vol. XIV, p. 291. Additional evidence of the hospital's breach of the applicable standard of care was presented through the hospital's own policies and procedures, which were in full force and effect on July 26, 2000, but were violated that day when Wayne Barkes was not examined by a physician. Exh. 5A-D. The CEO of the hospital, Terry Gunn, was responsible for the "overall administrative operation" of the hospital's Emergency Service. Exh. 5A, hospital policy 780-01-005. Mr. Gunn testified that he knew that in July, 2000 a patient presenting to the hospital Emergency Department would not be examined and assessed personally by a physician. R. Vol. XV, p. 724. This had been the case since 1999 when the hospital employed a "new improved" process in its Emergency Department. A jury could infer from this that the CEO of the hospital, who was responsible for the "overall administrative operation" of the hospital's Emergency Service, knew its policies were being violated before Wayne Barkes had the misfortune to seek emergency medical care at the hospital Emergency Department on July 26, 2000. Further, the medical care providers working in the hospital emergency room were not informed or otherwise educated as to the hospital policies. R. Vol. XIV, pp. 308 (Dr. Stone testifying that she was "not familiar with this policy here."); R. Vol. XVI, pp. 1017-1019 (Nurse Practitioner Kinkade testifying she was unaware of hospital policies).

There is also abundant evidence in the record on causation to support the jury's finding of fault on the part of the hospital. On July 26, 2000, Wayne Barkes presented the following risk

[11] Even Dr. Rosa Stone testified that the recognized standard of acceptable professional practice for emergency rooms in McMinnville, Tennessee or similar communities was for a physician to examine a patient who was classified as urgent. R. Vol. IV, pp. 309-310. Wayne Barkes was classified as "urgent" when he presented to the emergency room on July 26, 2000. R. Vol. XVI, p. 1028.

factors for a heart attack: (1) he was a male who was 48 years old; (2) he had a high level of cholesterol, 265; (3) he was obese; (4) he was a smoker; (5) he had a family history of "heart attack," and (6) he was on medication that was a stimulant that could potentially affect his heart function. R. Vol. XVI, pp. 830-832; R. Vol. XVI, pp. 926-929. Significantly, Mr. Barkes also had a heart rate of 100. The heart rate is normally between 60 and 80 and can go up and down depending on a number of circumstances. R. Vol. XVI, p. 832. The fact that somebody has a heart rate of 100 indicates there is an active process going on. In some patients with heart attacks, this is one of the signs of a fast heart rate. R. Vol. XVI, p. 829. Expert testimony was presented that if a physician had examined Wayne Barkes on July 26, 2000, the right questions would have been asked and he would have undergone a cardiac "work up." R. Vol. XV, pp.642-646, 649-650, R. Vol. XVI, p. 827. Indeed, Dr. Rosa Stone's own testimony supports this conclusion. Dr. Stone testified that when she was informed Wayne Barkes had pain "in the left," she wanted to exclude a cardiac-related illness. R. Vol. XIV, p. 297. When informed of information concerning Wayne Barkes that was not provided to her on July 26, 2000, and was not obtained by Nurse Practitioner Kinkade, such as that Mr. Barkes was a smoker, was obese, had high cholesterol and had a family history of cardiac problems, Dr. Stone testified that if she had had this information on July 26, 2000, "[w]e have to reevaluate him." R. Vol. XIV, pp. 297-299. Such a reevaluation would have resulted in a cardiac workup and saved Mr. Barkes' life. R. Vol. XV, pp. 642-646, 649-650; R. Vol. XVI, p. 827.

IV. REASONS WHICH JUSTIFY THE GRANT OF AN APPEAL TO DEBRA BARKES

As the Court well knows, TRAP 11(a) lists four factors that, while not controlling the Court's exercise of discretion, indicate the character of the reasons to be considered in granting an appeal to Ms. Barkes: "(1) the need to secure uniformity of decision, (2) the need to secure

settlement of important questions of law, (3) the need to secure settlement of questions of public interest and (4) the need for the exercise of the Supreme Court's supervisory authority." Debra Barkes respectfully requests this Court to grant her an appeal because all of the criteria enumerated above justify the grant of an appeal in this case.

Our analysis of the reasons which justify the grant of an appeal in this case will be divided into three separate parts: (1) the issues that relate to the Court of Appeals' action in sua sponte raising an issue out of left field as a basis for reversing the jury's determination that the hospital was at fault, its substitution of its determination on liability for the testimony of Plaintiff's expert witnesses and the jury's determination that the hospital was at fault, and its failure to affirm the jury's verdict when material evidence exists in this record which supports the jury's determination that the hospital was liable for the death of Wayne Barkes under TCA §29-26-115; (2) the legal issues which the Court of Appeals unnecessarily raised in this appeal which the Court of Appeals decided contrary to the provisions of TCA §29-26-115 and prior decisions of this Court and the Tennessee Court of Appeals; and (3) the issues which the hospital raised on appeal that the Court of Appeals pretermitted.

A. The Action by the Court of Appeals

1. The Court of Appeals Sua Sponte Deciding an Issue Which Was Conceded in the Trial Court Without Providing Ms. Barkes with a Meaningful Opportunity to Be Heard on That Issue

The following section of this Application pertains to the first three issues presented in the Questions Presented for Appeal. These issues relate to the Court of Appeals' conduct in adjudicating this appeal. An appeal as to these issues is required so that this Court can exercise its supervisory authority and further public policy as declared by the Tennessee Legislature.

The Court of Appeals' power to consider issues not presented for review is limited by TRAP 13(b), which provides that:

> **Consideration of Issues Not Presented for Review**. Review generally will extend only to those issues presented for review. The appellate court shall also consider whether the trial court and the appellate court have jurisdiction over the subject matter, whether or not presented for review, and may in its discretion consider other issues in order, among other reasons, (1) to prevent needless litigation, (2) to prevent injury to the interests of the public and (3) to prevent prejudice to the judicial process.

The Court of Appeals erred in sua sponte raising and reversing the jury verdict in this case on the issue of whether the hospital owed a duty to enforce its policies because the hospital conceded this issue in the trial court. TRAP 36(a) provides, in pertinent part, that "[n]othing in this rule [governing the grant of relief upon appeal] shall be construed as requiring relief … be granted to the party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Under our system of justice, a party cannot concede an issue in the trial court, suffer an adverse jury verdict and then contend its concession was reversible error. Similarly, the appellate court cannot do so either. It is unfair to the trial judge; it wastes limited judicial resources by turning an extensive trial into an exercise in futility and it is inherently prejudicial to the other party.

Tennessee courts have recognized that a trial court should grant summary judgment sua sponte to a nonmoving party "only in rare cases and with meticulous care." *March Group Inc. v. Bellar*, 908 S.W.2d 956, 958-959 (Tenn. Ct. App. 1995); *see also Thomas v. Transport Ins. Co.*, 532 S.W.2d 263 (Tenn. 1976). This should be done "only when the party opposing summary judgment has been given notice and a reasonable opportunity to respond to all the issues considered by the court." *March Group Inc. v. Bellar, supra*. The policy considerations which support this rule are that such sua sponte action is not in accordance with our traditional

adversarial system of justice because it places the trial court in the role of a proponent rather than an independent arbiter, is unfair to litigants and ultimately wastes rather than saves judicial resources. *See Stewart Title Guaranty Company v. The Cadle Company*, 74 F.3d 835, 836-837 (7th Cir. 1996). These policy considerations are even more forceful in an appellate setting because the wronged party does not have an appeal as of right and such conduct does a disservice to the trial court by transforming a hard-fought, well-conducted trial into an exercise in futility.

The Fifth and Fourteenth Amendments to the United States Constitution guarantee that citizens shall not be deprived by the federal or state governments of life, liberty or property without due process of law. US CONST, Amends. V, XIV §1. It is axiomatic that the right of due process, at a minimum, guarantees citizens the right "to be heard" – that is, a meaningful opportunity to present objections and arguments with regard to governmental actions that may result in a deprivation of their life, liberty or property. *See Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 313, 705 S. Ct. 652, 656-657 (1950) ("…there can be no doubt that at a minimum they [the words of the Due Process Clause] require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case") and *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 797, fn 4, 116 S. Ct. 1761, 1765 (1996) ("The opportunity to be heard is an essential requisite of due process of law in judicial proceedings.") Due process requires that, once the state has created a right of appeal, it must offer each party a fair opportunity to obtain an adjudication on the merits of an appeal. *Evitts v. Lucey*, 469 U.S. 387, 401, 105 S. Ct. 830, 839 (1985) (holding that once a state acts to grant an appeal as a matter of right, "it must nonetheless act in accord with the dictates of the Constitution – and in particular in accord with the Due Process Clause.") The United States

Supreme Court has recognized that a civil cause of action is the type of property interest which is protected by the Due Process Clause. *Logan v. Zimmerman Brush Co*., 455 U.S. 422, 428-430, 102 S. Ct. 1148, 1154 (1982) and *Mullane v. Central Hanover Bank & Trust Co., supra.*, 339 U.S. at 313, 70 S. Ct. 656-657. In the case at bar, the Court of Appeals never raised the issue of the duty owed by the hospital to Mr. Barkes in this case at any time and never presented the parties with an opportunity to brief that issue. The first indication that Debra Barkes had that this was an issue in this case was when her counsel read the December 29, 2008 opinion rendered by the Court of Appeals. In short, Debra Barkes had no meaningful opportunity to be heard on an issue that the Court of Appeals deemed was determinative in her case before it issued its opinion which reversed the jury verdict in this case.

Plaintiff submits that few things can be as damaging to the public confidence and trust in our court system than an appellate court raising an issue sua sponte that was conceded in the trial court and reversing a jury verdict without giving the plaintiff notice that it was raising this issue and providing the parties with a meaningful opportunity to be heard on that issue. By engaging in this conduct the Court of Appeals abandoned its passive role as an impartial arbiter in this appeal and became an advocate. Its role in the judicial process changed from being a neutral arbiter with the task of determining whether the parties received a fair trial into the finder of fact in this case. The Court of Appeals' conduct in this case was unnecessary and wasted limited judicial resources. In this case, an extensive trial was held before a hard-working judge and an impartial jury on issues litigated by competent and experienced counsel. This process has been rendered meaningless by a Court of Appeals that reversed a jury verdict based on its resolution of an issue conceded by the hospital in the trial court which was not raised on appeal.

This case was argued before the Court of Appeals in June, 2007. The Court of Appeals rendered its decision almost 18 months later, on December 29, 2008. If the Court of Appeals had limited its appellate review to the issues raised by the parties and jurisdictional issues, it could have issued its opinion in a timely fashion. Issuing an opinion almost 18 months after oral argument was held which reverses a jury verdict based on an issue that was conceded at trial and not raised on appeal creates the unfortunate impression that the Court of Appeals was looking for a way in which to reverse the jury's verdict rather than addressing the issues presented by the hospital on appeal.

This Court has previously reversed the Court of Appeals for unfairly reversing a jury verdict based upon its resolution of an issue that was not raised in the trial court and preserved for appeal. In *Alexander v. Armentrout*, 24 S.W.3d 267 (Tenn. 2000) this Court reversed the Court of Appeals for reversing a jury verdict on the basis of equitable estoppel, an issue which had not been argued during the trial or raised in post-trial motions. This Court determined that the equitable estoppel issue had been waived and that the Court of Appeals should never have considered that defense. *Alexander v. Armentrout, supra.*, 24 S.W.3d at 272.

2. The Court of Appeals Refused to Apply the Material Evidence Standard of Review, in Violation of Ms. Barkes' Right to Trial by Jury

Even more importantly, the Court of Appeals ignored the fact that this case was tried under TCA §29-26-115 on the issue of what was the recognized standard of acceptable professional practice for emergency rooms in McMinnville, Tennessee or a similar community on July 26, 2000. Since this case involved conduct which "constitutes a substantial relationship to the rendition of medical treatment by a medical professional," it is governed by the provisions of TCA §29-26-115. *Ward v. Glover*, 206 S.W.3d 17, 26-27 (Tenn. Ct. App. 2006) (holding

claim that hospital policies were not enforced was governed by the requirements of TCA §29-26-115.) As has been previously noted, this case was a battle of the experts on the applicable standard of care under TCA §29-26-115. The jury found Plaintiff's expert witnesses to be credible, adopted their testimony and rejected the testimony of the defense experts. The Court of Appeals should have affirmed the jury's verdict because there was material evidence, the testimony of Plaintiff's expert witnesses, that supported the jury's verdict. The Court of Appeals' refusal to apply the material evidence standard and to uphold the jury's verdict violated Debra Barkes' constitutional right to a jury trial. *Barnes v. Goodyear Tire and Rubber Co*., 48 S.W.3d 698, 704-705 (Tenn. 2000). Instead the Court of Appeals disregarded any evidence in the record that supported the jury's verdict and substituted its own opinion on the recognized standard of acceptable professional practice for emergency rooms in McMinnville, Tennessee or similar communities in July, 2000 in the place of the Plaintiff's expert witnesses testimony and impermissibly substituted its opinion on the hospital's liability for the verdict of the jury.

As this Court noted in *Smith v. Gore*, 728 S.W.2d.738, 746 (Tenn. 1987), the law in Tennessee restricts the Tennessee Supreme Court's role in declaring public policy, let alone the Court of Appeals' capacity to do so. "Only in the absence of any declaration in [the Constitution and the statutes] may [public policy] be determined from judicial decisions." *Smith v. Gore, supra.,* at 747.

The Tennessee Medical Malpractice Act is the Legislature's declaration of Tennessee public policy that a hospital is liable when it breaches the recognized standard of acceptable professional practice for hospitals in its community or a similar community which results in an injury to a plaintiff which would not otherwise have occurred. The Court of Appeals ignored this statute and exonerated the hospital from a jury verdict in this case because it thought the

Plaintiff's case was "fallacious." The Tennessee Medical Malpractice Act does not contain a provision which precludes a defendant from being held liable because the Tennessee Court of Appeals disagrees with the testimony of plaintiff's expert witnesses which the jury found to be credible testimony and adopted in finding that defendant liable. In short, the Court of Appeals has attempted to declare Tennessee public policy in this case by creating a judge-made exception to a defendant's liability under TCA §29-26-115 when that exception to liability has no basis in the Tennessee Medical Malpractice Act.

3. Confusion Over Precedential Value of Court of Appeals Rulings on Issues Not Appealed to the Supreme Court

An additional reason for this Court to exercise its supervisory authority in this case is the manner in which the Court of Appeals interpreted the Court of Appeals decision *Bryant v. McCord*, No. 01A01-9801-CV-00046 (Tenn. Ct. App., filed Jan. 12, 1999) (copy attached in Appendix). In *Bryant*, the Court of Appeals, in pertinent part, ruled that the trial court improperly granted summary judgment to the hospital on the direct negligence claim that it failed to supervise and monitor the use of investigational medical devices but affirmed the trial court's determination that the hospital owed no duty to obtain the plaintiffs' informed consent prior to the performance of surgery. The Supreme Court granted plaintiffs an appeal limited to the issue of whether the hospital owed a duty to the patient to obtain her informed consent. It affirmed the Court of Appeals' determination that under the facts of the case, the hospital owed no duty to obtain Rhonda Bryant's informed consent. *Bryant v. HCA Health Services of Tennessee*, 15 S.W.3d 804 (Tenn. 2000).

In short, the Court of Appeals' holding in *Bryant* that it was unnecessary for Tennessee courts to adopt the doctrine of corporate negligence because prior Tennessee cases have recognized such obligations on the part of a hospital was never appealed to the Supreme Court.

The Court of Appeals decision in *Bryant v. McCord*, *supra*., has been cited as persuasive authority on the issue of a hospital's direct or institutional negligence by Tennessee courts. *Wicks v. Vanderbilt University*, No. M2006-00613-COA-R3-CV, 2007 WL 858780 (Tenn. Ct. App., filed March 21, 2007) at p. 17 (copy attached in Appendix). As evidenced by the arguments of counsel in the trial court in this case, the bar has also interpreted the Court of Appeals decision in *Bryant v. McCord, supra.*, as having persuasive precedential value.

Yet the Court of Appeals in this case deemed the Court of Appeals opinion in *Bryant v. McCord, supra.*, to have no precedential value, citing *Patton v. McHone*, 822 S.W.2d 608, 615, n. 10 (Tenn. Ct. App. 1991) and *Clingan v. Vulcan Life Insurance Company*, 694 S.W.2d 327, 331 (Tenn. Ct. App. 1985). The *Patten* and *Clingan* cases stand for the proposition that an opinion authored by the Court of Appeals which the Tennessee Supreme Court has declined to review with the statement "concurring in result only" establishes that the opinion of the Court of Appeals has no precedential value. In *Bryant*, the Tennessee Supreme Court was presented with a Rule 11 Application for Permission to Appeal by the hospital on an issue related to the effect of a settlement by AcroMed, a medical device manufacturer, and a Rule 11 Application for Permission to Appeal filed by plaintiffs on the issue of whether the hospital owed Rhonda Bryant a duty to obtain her informed consent. This Court entered an order which denied the hospital's Rule 11 Application and which granted the plaintiffs' Application. A copy of this order is attached in the Appendix. In *Bryant*, this Court never entered an order denying an appeal "concurring in results only."

The Court of Appeals' discussion of the precedential value of the *Bryant v. McCord* decision is not merely erroneous, it is misleading and will cause confusion concerning the precedential value of opinions decided by the Court of Appeals in which the Supreme Court limits the grant of an appeal to a single issue without addressing other aspects of the intermediate appellate court's decision.

In summary, this Court is requested to exercise its supervisory authority over the Court of Appeals to insure that it understands its role in the judicial system. The Court of Appeals is not an advocate. Its responsibility is not to raise issues that were conceded in the trial below and not preserved for an appeal, unless such issues relate to subject matter jurisdiction. Its role is to be a neutral arbiter that addresses the properly raised issues in an appeal and insures that the trial court and the appellate courts have subject matter jurisdiction. It is not the role of the Court of Appeals to declare Tennessee public policy or create judge-made exceptions to unambiguous legislation which imposes liability on a hospital under the facts determined by the jury. Once the Court of Appeals deviates from its neutral status and substitutes its opinions for the testimony of a party's expert witnesses and a jury's decision on liability, our judicial system no longer works as intended, miscarriages of justice occur and the public loses confidence in a judiciary that appears to be arbitrary and biased.

B. The Legal Issues Involving Hospital Liability

1. The Duty Issue

The hospital liability issues addressed by the Court of Appeals in its December 29, 2008 opinion involve important questions of law. Since the decision rendered by the Court of Appeals conflicts with TCA §29-26-115 and prior Tennessee case law, this Court should grant an appeal in this case in order to secure uniformity of decision and to settle important questions of law.

In its opinion at p. 7, the Court of Appeals diminished a hospital's general duty of care owed to its patients by citing *O'Quin v. Baptist Memorial Hosp*., 188 S.W.2d 346 (Tenn. 1947) for the following legal proposition:

> "…a hospital has a duty to exercise such reasonable care toward a patient as [the patient's] *known condition* may require and the extent and character depends upon the circumstances of each case."
>
> *Id*. (citing 41 CJS *Hospitals*, §8, p. 349)

Before the Tennessee Medical Malpractice Act was passed, Tennessee decisions were split as to the standard of care owed by a hospital to its patients. *White v. Baptist Memorial Hospital*, 363 F.2d 37 (6th Cir. 1966) (analyzing Tennessee cases and noting different standards). One group of cases, the *O'Quin* decision and its progeny, limited the standard of care to known conditions, while a later Tennessee Supreme Court decision, *Thompson v. Methodist Hospital*, 367 S.W.2d 134, 138 (Tenn. 1963) held that "[t]he measure of duty of a hospital is to exercise that degree of care, skill and diligence used by hospitals generally in that community and required by the express or implied contract of the undertaking."

This split in Tennessee case law was resolved by TCA §29-26-115 of the Tennessee Medical Malpractice Act which adopted the local community or a similar community standard as the standard of care owed by a hospital in a medical negligence case which must generally be proven by expert witness testimony.

The "duty" adopted by the Court of Appeals in this case, which is really a standard of care, is contrary to basic tort law because it truncates a hospital's liability to known conditions and eliminates the concept of foreseeability. See *Foley v. Bishop Clarkson Memorial Hospital*, 173 N.W.2d 881, 884-885 (Neb. 1970). The "known condition" rule recognized by the Tennessee Court of Appeals in this case is directly contrary to prior decisions of this Court which

employ the concept of foreseeability in a common-law duty analysis. *McCall v. Wilder*, 913 S.W.2d 150,153 (Tenn. 1995) ("A risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in an alternative conduct that would have prevented the harm.")

In support of the diminished duty it found a hospital owes to a patient, the Court of Appeals does not refer to or cite in its opinion any authority that identifies any public policy furthered by so limiting a hospital's standard of care in a way that is contrary to basic tort principles. Indeed, the only authority cited by the *O'Quin* court in support of its truncated duty is 41 CJS *Hospitals*, §8, p. 349. A current edition of CJS *Hospitals* concerning the standard of care owed by hospitals is attached in the Appendix. It reflects the law as it currently stands and makes no mention of a hospital having a standard of care limited to known conditions.

The law concerning hospital liability has evolved since the 1950s. Beginning with *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957), courts have recognized that the days when hospitals were charitable institutions which merely provided space for physicians to perform operations are long gone. As the *Bing* court noted:

> "…Present day hospitals, as their manner of operation plainly demonstrates do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and interns, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of 'hospital facilities' expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility."
>
> 143 N.E.2d at 8

Since the *Bing* case was decided in 1957, the role of the hospital in the health care system has become paramount. People look to a hospital as the provider for their health care. This is

demonstrated by a research study published on January 26, 2009 in the Archives of Internal Medicine in which 2,807 adults admitted to the University of Chicago Hospital over a 15-month period were questioned about the roles of various physicians attending to them. Seventy-five percent of the patients were unable to identify a single doctor assigned to their care. *Ability of Patients to Identify Their In-Hospital Physician*, ARCHIVES OF INTERNAL MEDICINE, 2009; 169(2), pp. 199-201. As the Supreme Court of Washington noted, the public perceives "the modern hospital as a multifaceted health care facility responsible for the health care and treatment rendered. The community hospital has evolved into a corporate institution, assuming the role of a comprehensive health center ultimately responsible for arranging and coordinating total healthcare." *Pedroza v. Bryant*, 677 P.2d 166, 169 (Wash. 1984).

The recognition of the doctrine of hospital institutional negligence or hospital corporate negligence or hospital direct negligence is merely the recognition that hospitals have an independent responsibility to patients to supervise medical treatment provided by members of its medical staff. *Pedroza v. Bryant*, *supra.*, 677 P.2d at 168. In *Blanton v. Moses H. Cone Memorial Hospital, Inc.*, 354 S.E.2d 455, 457 (N.C. 1987), when presented with the issue of whether it should recognize the doctrine of corporate negligence regarding a hospital's liability to its patients, the Supreme Court of North Carolina noted that such a doctrine is simply an application of common law negligence principles. In recognizing that a hospital had a duty to enforce its own policies, the North Carolina Supreme Court noted prior North Carolina decisions which recognized that hospitals owed an independent duty of care to a patient. 354 S.E.2d at 457-458. The *Blanton* court recognized that the hospital owed its patients a duty to enforce the standards of the Joint Commission on the Accreditation of Hospitals and to exercise due care in granting clinical privileges to a physician. *Id*.

In *Bryant v. McCord*, CA No. 01A01-9801-CV 00046 (Tenn. Ct. App., filed January 12, 1999) (copy attached in Appendix), the Tennessee Court of Appeals noted that it was unnecessary to formally adopt the doctrine of corporate negligence because it determined that prior Tennessee decisions had recognized all of the duties encompassed in that doctrine. *Bryant v. McCord*, p. 15. Specifically, the *Bryant* court cited *Prince v. Coffee County, Tennessee*, No. 01A01 9508 CV00342 1996 WL 221863 (Tenn. Ct. App., filed May 3, 1996) (copy attached in the Appendix) which recognized that a claim that a hospital failed to establish and enforce adequate anesthetic policies and procedures was valid under Tennessee law. In other words, Tennessee courts under the Tennessee Medical Malpractice Act have recognized and applied to hospitals the various duties that have been deemed to constitute "corporate" or "institutional" hospital negligence.

The Court of Appeals' claim that the Court of Appeals' decision in *Bryant v. McCord, supra.*, has no precedential value and that no prior Tennessee court has recognized a claim against a hospital for failure to promulgate or enforce its policies is simply wrong. First, the claim was recognized by the Tennessee Court of Appeals in *Prince v. Coffee County, Tennessee, supra.* (copy attached in the Appendix). Second, as has been previously noted, the portion of the *Bryant v. McCord* decision which recognized a claim against a hospital for failure to supervise and monitor the use of investigational medical devices was never appealed to the Tennessee Supreme Court. HCA filed a Rule 11 Application for Permission to Appeal on the AcroMed Settlement issue which this Court denied. A copy of this order is attached in the Appendix. This Court has <u>never</u> issued an order denying an appeal in the *Bryant* case which stated it was "concurring in results only." Thus, until the December 29, 2008 opinion by the Court of Appeals,

both the bench and bar treated the ruling by the Court of Appeals in *Bryant* as having persuasive authority.

The December 29, 2008 opinion rendered by the Court of Appeals also conflicts with this Court's decision in *Bryant v. HCA Health Services of Tennessee, Inc*., 15 S.W.3d 804 (Tenn. 2000). In *Bryant*, this Court decided the issue of whether a hospital had a duty to obtain a patient's informed consent by construing the Tennessee Medical Malpractice Act, specifically TCA §29-26-118. It determined that the statutory duty to obtain a patient's informed consent did not apply to a hospital based upon its construction of TCA §29-26-118. Based on *Bryant*, it follows that the hospital in this case had a statutory duty to adhere to the recognized standard of acceptable professional practice for emergency rooms in McMinnville, Tennessee or a similar community in July, 2000 under TCA §29-26-115.

The Court of Appeals' determination that the hospital owed no duty to follow its own policies and procedures flies in the face of TCA §29-26-115, which establishes that the hospital has a duty to comply with the recognized standard of acceptable professional practice for hospitals in McMinnville, Tennessee or a similar community at the relevant time. The Plaintiff's evidence of the hospital's violation of its own policies was not conclusive evidence of the standard of care. It was introduced as evidence that the hospital violated the recognized standard of acceptable professional practice. Courts recognize that while internal policies cannot be conclusive of the standard of care, breach of such policies is relevant evidence of negligence because such policies demonstrate that the hospital foresaw the risk of harm and had the ability to avoid the harm. *Johnson v. St. Bernard Hospital*, *supra.*, 399 N.E.2d 198, 205 (Ill. App. 1979), *Williams v. St. Claire Medical Center*, 657 S.W.2d 590, 594-595 (Ky. App.. 1983), *Boland v. Garber*, 257 N.W.2d 384, 386 (Minn. 1977); *Denton Regional Medical Center v. LaCroix*, 947

S.W.2d 941 (Ct. App. Texas 1997); *Hodge v. UMC of Puerto Rico, Inc.*, 933 F.Supp. 145, 148-149 (D. Puerto Rico 1996) ("Courts in the United States have almost universally held that hospital rules, regulations and policies alone do not establish the standard of medical care in the medical community but may be used as evidence of that standard of care," *citing cases*.)

Rather than recognizing the application of TCA §29-26-115 in this case and the fact that evidence of the hospital's policies merely evidenced the standard of care as established by expert witness testimony and the breach of such policies evidenced that the hospital was negligent, the Court of Appeals relied on a decision by the Maine Supreme Court, *Gafner v. Down East Community Hospital*, 735 A.2d 969 (Me. 1999) to reverse the jury's verdict in this case. In *Gafner* the Maine Supreme Court declined to recognize a claim against a hospital for failing to have in place at the time of plaintiff's birth a written policy requiring mandatory consultation with a specialist in high-risk births. 735 A.2d at 976. The *Gafner* court noted that the Maine legislature had not placed such a duty on hospitals and that plaintiffs were requesting that court "to recognize a duty on the part of hospitals to adopt rules and policies controlling actions of independent physicians practicing within its walls." 735 A.2d 976. The Maine Supreme Court refused to recognize a duty because the legislature has not chosen to place upon hospitals a specific duty to regulate the medical decisions of physicians practicing within the facility.

For a number of reasons, the Court of Appeals' reliance on the *Gafner* decision is misplaced. First, it has no application in Tennessee because it interpreted the common law. In the case at bar, the hospital's liability was governed by the Tennessee Medical Malpractice Act, specifically TCA §29-26-115. The jury in this case determined that the hospital had violated its statutory duty owed to Wayne Barkes which resulted in his death which would not have otherwise occurred. There is material evidence in this record which supports the jury's verdict in

this case. As has been previously noted, neither the Tennessee Court of Appeals nor the Maine Supreme Court declares Tennessee public policy. This is the role of the Tennessee Legislature. The Tennessee Court of Appeals has no authority to create a judicial exception to the application of TCA §29-26-115 merely because it disagrees with the testimony of Plaintiff's expert witnesses which the jury adopted in finding the hospital liable in this case.

Second, the *Gafner* decision has no application in Tennessee because hospitals in Tennessee are obligated to promulgate policies and procedures to provide quality care for a patient. In *Scott v. Ashland Health Care Center, Inc*., 49 S.W.3d 281 (Tenn. 2001), the Tennessee Supreme Court recognized that the holders of a certificate of need and a license to operate a health care facility, such as the defendants in this case, have a nondelegable duty to operate their facility. The certificate of need and license issued to the defendants are contained in the record as Exh. 2 and 3. The *Scott* court noted that the purpose of Tennessee's certification and licensing statutes and rules that apply to health care facilities is "to ensure adequate, orderly and economical health care for the citizens of Tennessee." *Scott, supra.*, 49 S.W.3d at 286. The Rules of the Tennessee Department of Health Board for Licensing Health Care Facilities require a hospital which operates an emergency room to establish policies and procedures governing medical care provided in the hospital emergency room through its medical staff. These policies and procedures are required to "define how the hospital will assess, stabilize, treat and/or transfer patients." Rules of Tennessee Department of Health Board for Licensing Health Care Facilities, 1200-8-1-.07(5)(d)(3). Unlike Maine, in Tennessee the Legislature has declared the public policy of Tennessee to require hospitals to promulgate and enforce policies and procedures governing how the hospital will assess, stabilize, treat and transfer patients in an Emergency Room.

Third, the Plaintiff's claim in this case is not that the defendant should have promulgated some policy it never considered or enacted, which is the claim asserted in *Gafner*. Plaintiff's claim is that the hospital breached the recognized standard of acceptable professional practice for emergency rooms in McMinnville, Tennessee, or similar community by failing to have a physician examine Wayne Barkes when he presented to its Emergency Room on July 26, 2000. Its failure to enforce an existing hospital policy, which required that this be done, is evidence of the standard of care and of the hospital's negligence. This claim is entirely consistent with the Tennessee Medical Malpractice Act and, specifically, TCA §29-26-115. The significance of the hospital having adopted and placed into effect a policy is explained by a leading treatise as follows:

> "A hospital's internal rules, as contained in protocols, policies, procedures, manuals, and bylaws, also can be used as evidence of the standard of care required in the circumstances of a particular case. [footnote omitted] Although an individual hospital's rules and regulations do not alone establish the standard of care the facility owes a patient, failure to follow such rules can be evidence of negligence [footnote omitted]; a facility's noncompliance with its own guidelines is often very damaging in the eyes of a judge or jury.
>
> "When the hospital's own rules exceed what is required by the standard of care, the hospital has effectively elevated the standard of care. Where hospital policy adopts accreditation standards, for example, the hospital may be held liable for deviations from those standards, even if participation is voluntary."
>
> 3 HOSPITAL LAW MANUAL, §2-3,
> *Violation of Hospital Rules and Bylaws, p. 28 (2009)*

In other words, once the hospital enacted a policy which required each patient that presented to its Emergency Service to be assessed by a physician, its failure to enforce that policy is evidence of its own negligence.

Fourth, the imposition of liability in this case does not involve the hospital in the practice of medicine. In *Johnson v. St. Bernard Hospital*, 399 N.E.2d 198, 205 (Ill. App. 1979), plaintiff sued the hospital alleging his medical injury was caused by its negligence in failing to enforce its

policies. The court noted that "[i]t requires not medical expertise, but administrative expertise to enforce rules and regulations which were adopted by the hospital to insure a smoothly run hospital routine and adequate patient care and under which the physicians have agreed to operate." 399 N.E.2d at 205. The hospital's inevitable argument that "it cannot practice medicine" has no application in this case.

The lower court's reliance on *Prewitt v. Semmes-Murphey Clinic PC,* No. W2006-00556-COA-R3-CV, 2007 WL 879565 (Tenn. Ct. App. March 23, 2007) is also misplaced. In *Prewitt* the Court held that attempting to prove the standard of care by cross-examining hospital employees about policies and procedures did not satisfy the expert witness requirements of TCA §29-26-115.

In the case at bar, the trial court held that Plaintiff's experts, Dr. Kern, Dr. Keys and Alan L. Markowitz, a hospital administrator, were competent to offer expert witness testimony under TCA §29-26-115. The hospital has not contested the trial court's determination in this regard on appeal. These witnesses testified that the recognized standard of acceptable professional practice for an emergency room in McMinnville, Tennessee or a similar community on July 26, 2000 was to have a physician examine and assess each person that presented to an emergency room. R. Vol. XVI, pp. 854-855; R. Vol. XV, pp. 628-630; R. Vol. XIII, pp. 334, 349-350. This testimony was supported by proof that the hospital's policies and procedures in fact required that this be done. The hospital's failure to follow its own policies and procedures is evidence of its negligence.

This is not a case in which the policy of the hospital was the only evidence of the standard of care or was deemed to be conclusive of the standard of care. Indeed, to qualify to testify under TCA §29-26-115 Plaintiff's experts were required to testify as to the recognized

standard of acceptable professional practice for an emergency room in McMinnville, Tennessee, or a similar community in July, 2000.

Not only did the Court of Appeals ignore the fact that Plaintiff's expert witness proof was predicated upon qualified witnesses' knowledge of the recognized standard of acceptable professional practice in McMinnville or a similar community when a patient presented to an Emergency Room on July 26, 2000, it ignored Plaintiff's theory. The fact that Tennessee regulations allow a nurse practitioner to assess a patient in a variety of settings is not relevant in this case. The expert witness proof, which the jury adopted, was that the recognized standard of acceptable professional practice for McMinnville or similar communities was that each patient who presented to an Emergency Room was required to be assessed by a physician. The facts involved in this case clearly establish why this was the standard of care. It is clearly foreseeable that anyone going to an Emergency Room can have a life-threatening condition which can involve a complicated, multifaceted diagnosis. A physician has the experience and knowledge to properly diagnose such conditions. The jury determined that the hospital's failure to require Wayne Barkes to be examined and assessed by a physician proximately caused his death. The fact that nurse practitioners are authorized to perform certain functions under the supervision of a doctor does not mean that their use in every conceivable situation complies with the standard of care. If the standard of acceptable professional practice required that a physician assess each patient presenting to an Emergency Room, that standard is violated when a nurse practitioner examines a patient because that nurse practitioner lacks the skill and training of a physician.

In summary, the December 29, 2008 opinion rendered by the Court of Appeals is inconsistent with TCA §29-26-115 and a hospital's statutory duty to comply with the recognized standard of acceptable professional practice for emergency rooms in McMinnville, Tennessee or

a similar community in July, 2000. The jury determined the hospital violated its statutory duty, causing the death of Wayne Barkes. It is also inconsistent with this Court's decision in *Bryant v. HCA Health Services of Tennessee, Inc., supra.*, and the Court of Appeals' opinions in *Bryant v. McCord, supra.*, and *Prince v. Coffee County Medical Center, supra*. Finally, this opinion is inconsistent with the public policy of the State of Tennessee, as declared in TCA §29-26-115 and the health care facility certificate of need and licensing statutes and regulations. The health care facility statutes and regulations require the hospital to promulgate policies and procedures for its Emergency Department. The Court of Appeals holding that a hospital has no duty to comply with these policies and procedures renders this regulatory requirement meaningless and is contrary to declared Tennessee public policy.

2. The Inconsistent Verdict Issue

The hospital argues that the verdict is inconsistent because the jury did not find a health care provider who treated Mr. Barkes liable for medical malpractice while finding the hospital 100 percent at fault under a theory of direct liability.[12] This is a very important legal issue in Tennessee because the hospital's argument is an attempt to morph a hospital's direct negligence for failure to provide quality health care into a vicarious liability claim.

A hospital's duty to provide quality health care, which involves enforcing its policies and procedures, is a nondelegable duty. *Scott v. Ashland Healthcare Center, Inc.*, 49 S.W.3d 281 (Tenn. 2001). Courts that have been presented with the issue of whether a jury verdict is inconsistent and a nullity because a hospital was found to be at fault under a theory of direct or institutional negligence while the physicians and nurses were exonerated, have held that there is no inconsistency in the verdict because the hospital has a separate, stand-alone duty which is

[12] The Court of Appeals never addressed this issue because it determined that the Plaintiff had no claim against the hospital for direct or institutional negligence.

separate and apart from any duty owed by the physician or nurse. *Longnecker v. Loyola University Medical Center*, 891 N.E.2d 954 (Ill. App. 2008) ("Finally, the circuit court's conclusion that a verdict in favor of Dr. Parvathaneni precluded a proximate cause showing as to the institutional negligence claim, in the context of this case, is, simply put, wrong. Our supreme court has expressly stated: 'Liability is predicated on the hospital's own [institutional] negligence, not the negligence of the physician [authority cited]. [T]he tort of institutional negligence does not encompass, whatsoever, a hospital's responsibility for the conduct of its *** medical professionals." 891 N.E.2d at 970); *Denton Regional Medical Center v. LaCroix*, 947 S.W.2d 941, 949 (Ct. App. Tx. 1997) ("Because we hold the hospital can be held directly liable to [the plaintiff] for its own negligence, the jury's failure to find culpability on the part of the other medical providers is immaterial to the issue of the hospital's liability.") The hospital's duty in this regard is nondelegable, which by definition means it cannot be delegated to another health care provider.

The hospital presents a flawed argument in asserting that the jury's exoneration of Dr. Weeks from fault is fatally inconsistent with its determination that the hospital was at fault. First, the hospital's duty is nondelegable. Second, Dr. Weeks' responsibilities as Medical Director of the Emergency Services Department were defined by his contract, which is located in the record as Exhibit 4, p. 8, Service Agreement, Exclusive Provider No. 2, Director of Services. This contract does not place upon Dr. Weeks the responsibility for insuring that the hospital's policies and procedures are followed. In fact, Exhibit 5A, hospital policy 780-01-005, provides that "[t]he overall administrative operation of the Emergency Operation is the responsibility of the Chief Executive of the hospital."

In *Ward v. Glover, supra.*, the plaintiff sued Dr. Gary Glover in his capacity as Medical Director of the OB unit at Baptist Hospital of East Tennessee, alleging that he was negligent in failing to adopt and enforce appropriate OB policies and procedures for the hospital. The Tennessee Court of Appeals affirmed the grant of summary judgment to Dr. Glover, holding that Dr. Glover was not issued a certificate of need and a license to operate a health care facility. Thus he had no obligation to promulgate hospital policies. The entity with that obligation was Baptist Hospital of East Tennessee, the holder of the certificate of need and license to operate a health care facility. 206 S.W.3d at 27. The *Ward* Court further noted that Dr. Glover's duties were defined by contract and that the contract with the hospital did not place on him the responsibility of adopting and ensuring the enforcement of OB policies for the hospital. 206 S.W.3d at 29-33.

The hospital's claim of comparative fault against Dr. Weeks fails as a matter of law because the hospital, as the holder of the certificate of need and the license to operate the hospital had the nondelegable duty to adopt and insure the enforcement of policies and procedures for its Emergency Service. *Scott v. Ashland Health Care Center*, 49 S.W.3d 281 (Tenn. 2000). Allowing the hospital to foist this obligation upon Dr. Weeks would undermine the purpose of the certificate of need and health care facility licensing statutes, which is to ensure adequate, orderly and economical health care for the citizens of Tennessee. *Scott v. Ashland Health Care Center, supra.*, 49 S.W.3d at 286. Allowing the hospital to promulgate policies and procedures as required by the certificate of need and licensing statutes and regulations promulgated thereunder but avoid responsibility for the failure to enforce such policies and procedures by casting blame upon a third party, such as Dr. Weeks, would render the certificate of need and licensing process meaningless.

In the trial court and in the Court of Appeals, the hospital relied on negligent credentialing cases to support its argument that the jury verdict was inconsistent in this case. There is no doubt that in a negligent credentialing case, in order to prove that the hospital's negligence caused an injury, the plaintiff must demonstrate that an incompetent physician proximately caused an injury by committing medical malpractice. This is necessary because the claim is that an incompetent physician should not have been allowed to practice in the hospital because it is foreseeable that an incompetent physician would commit medical malpractice. This logic doesn't apply in a failure to enforce hospital policy case. In order to establish proximate cause in a failure to enforce hospital policy claim, the failure to enforce the policy must proximately cause an injury to the plaintiff. *Daniels v. Durham County Hospital Corporation*, 615 S.E.2d 60, 65 (N.C. Ct. App. 2005) (holding plaintiff has burden to prove that failure to have a proper policy in place proximately caused injury. "Without … evidence of what a proper policy would have stated, it is impossible to determine whether such a policy would have precluded the injury in this case and thus whether the lack of a policy was a contributing factor [to plaintiff's injury].")

In sum, the opinion rendered by the Court of Appeals in this case is inconsistent with TCA §29-26-115, prior Tennessee case law and Tennessee public policy as declared by the Legislature. It will lead to confusion concerning important issues of hospital liability. The Court of Appeals' interpretation of Tennessee law governing hospital liability reflects the views of courts in the 1940s and 1950s and fails to adequately protect Tennessee citizens who view a hospital as a health center that coordinates, monitors and organizes the health care it provides. When Wayne Barkes went to the hospital Emergency Room on July 26, 2000, he had a reasonable expectation that the hospital would provide him with adequate quality health care.

D. Other Issues

The Court of Appeals pretermitted the issues raised by the hospital on causation and comments made by Plaintiff's counsel during closing argument. For purposes of judicial economy and to resolve this case as expeditiously as possible, if the Court grants Debra Barkes an appeal in this case, Mrs. Barkes requests that the pretermitted issues be included in an appeal to this Court. Wayne Barkes died on July 26, 2000. This case was tried in January, 2006. This appeal was argued to the Court of Appeals in June, 2007. The inclusion of these issues in an appeal will not unduly burden the Court. The causation issue can be resolved by merely applying the material evidence standard of appellate review. *Barnes v. Goodyear Tire & Rubber Co*., 48 S.W.3d 698, 704-705 (Tenn. 2000). The comments made by counsel which the hospital claims require that the jury verdict be reversed are discussed in pages 53-60 of the brief filed on behalf of Debra Barkes in the Court of Appeals. Plaintiff submits that this Court will not need "to tarry long" in disposing of this issue. The trial court most certainly did not abuse its discretion in denying the hospital a new trial based upon anything that was said in closing argument. *Freeman v. Blue Ridge Paper Products, Inc*., 229 S.W.3d 694, 712 (Tenn. Ct. App. 2007) (holding that when a trial court refused to grant a new trial for an alleged inappropriate argument, such a ruling will not be reversed unless "the argument is clearly unwarranted and made purely for the purpose of appealing to the passion, prejudice and sentiments which cannot be removed by sustaining the objection of counsel.")

V. CONCLUSION

The practical effect of the opinion rendered by the Court of Appeals is that it substituted its views on the recognized standard of acceptable practice for hospitals in McMinnville, Tennessee or a similar community, for the Plaintiff's expert witnesses' testimony, which the jury

adopted, and additionally substituted its view on liability for the jury's verdict. This case involves the Tennessee Court of Appeals abandoning its role as a neutral arbiter with the duty to determine whether the parties received a fair trial. Rather than ruling on the issues tried in the lower court and preserved for appeal, it sua sponte addressed an issue that was conceded in the trial court and, in effect, substituted its views on liability for the jury's verdict. Further, the Court of Appeals disregarded the provisions of TCA §29-26-115 and unnecessarily engaged in a duty analysis that resulted in a declaration of the law of hospital liability that reflects the law as it existed in the 1940s and 1950s. The opinion rendered by the Court of Appeals is not only contrary to TCA §29-26-115 and prior decisions by Tennessee courts, it is contrary to Tennessee public policy as declared by the Legislature.

This Court is requested to grant Debra Barkes an appeal so that this Court can exercise its supervisory authority to ensure that Debra Barkes' right to a trial by jury is not violated, so that there will be uniformity in decisions by Tennessee courts on issues pertaining to hospital liability, so that important questions of law will be settled, and so that questions of importance to the public regarding hospital liability will be resolved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Rule 11 Application for Permission to Appeal has been mailed by first class United States mail, postage prepaid, to the following counsel:

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on this the ____ day of February, 2009.

David Randolph Smith

APPENDIX

1. December 29, 2008 Court of Appeals Opinion

2. *Bryant v. McCord*, No. 01 A01-9801-CV-00046, 1999 WL 10085 (Tenn. Ct. App., filed January 12, 1999).

3. Order entered by Tennessee Supreme Court in *Bryant v. HCA Health Services of Tennessee, Inc.*, in which Rule 11 Application of Plaintiffs was granted and Rule 11 Application of HCA Health Services of Tennessee, Inc. was denied.

4. *Wicks v. Vanderbilt University*, No. M2006-00613-COA-R3-CV, 2007 WL 858780 (Tenn. Ct. App., filed March 21, 2007)

5. *Foley v. Bishop Clarkson Memorial Hospital*, 173 N.W.2d 881 (Neb. 1970)

6. Current edition 41 CJS Hospitals, pertinent part on standard of care owed by hospitals

7. *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957)

8. *Pedroza v. Bryant*, 677 P.2d 166 (Wash. 1984)

9. *Blanton v. Moses H. Cone Memorial Hospital, Inc.*, 354 S.E.2d 455 (N.C. 1987)

10. *Prince v. Coffee County, Tennessee*, No. 01A01 9508 CV 00342 (Tenn. Ct. App., filed May 3, 1996)

11. *Johnson v. St. Bernard Hospital*, 399 N.E.2d 198 (Ill. App. 1979)

12. *Williams v. St. Claire Medical Center*, 657 S.W.2d 590 (Ky. App. 1983)

13. *Boland v. Garber*, 257 N.W.2d 384 (Minn. 1977)

14. *Denton Regional Medical Center v. LaCroix*, 947 S.W.2d 941 (Ct. App. Texas 1997)

15. *Gafner v. Down East Community Hospital*, 735 A.2d 969 (Me. 1999)

16. *Prewitt v. Semmes-Murphey Clinic PC*, No. W2006-00556-COA-R3-CV, 2007 WL 879565 (Tenn. Ct. App., filed Aug. 20, 2007)

17. *Longnecker v. Loyola University Medical Center*, 891 N.E.2d 954 (Ill. App. 2008)

18. *Daniels v. Durham County Hospital Corporation*, 615 S.E.2d 60 (N.C. Ct. App. 2005)